Office - Supreme Court, U. S.
FILED
JUL 2 1953
HAROLD B. WILLEY, Clerk

No. 161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

SIMONE N. GAZAN,

Petitioner,

against

JOSEPH S. CORBETT, as Chairman, and HAROLD E. GRIFFIN, STEVEN G. JORDAN, FRANK P. RINK, as Members, and FRANK A. SCHAEFER, as Secretary, Constituting the Zoning Board of Appeals of the Town of Brookhaven, Suffolk County, New York,

Respondents,

OCEAN SHORE REALTY CO.,

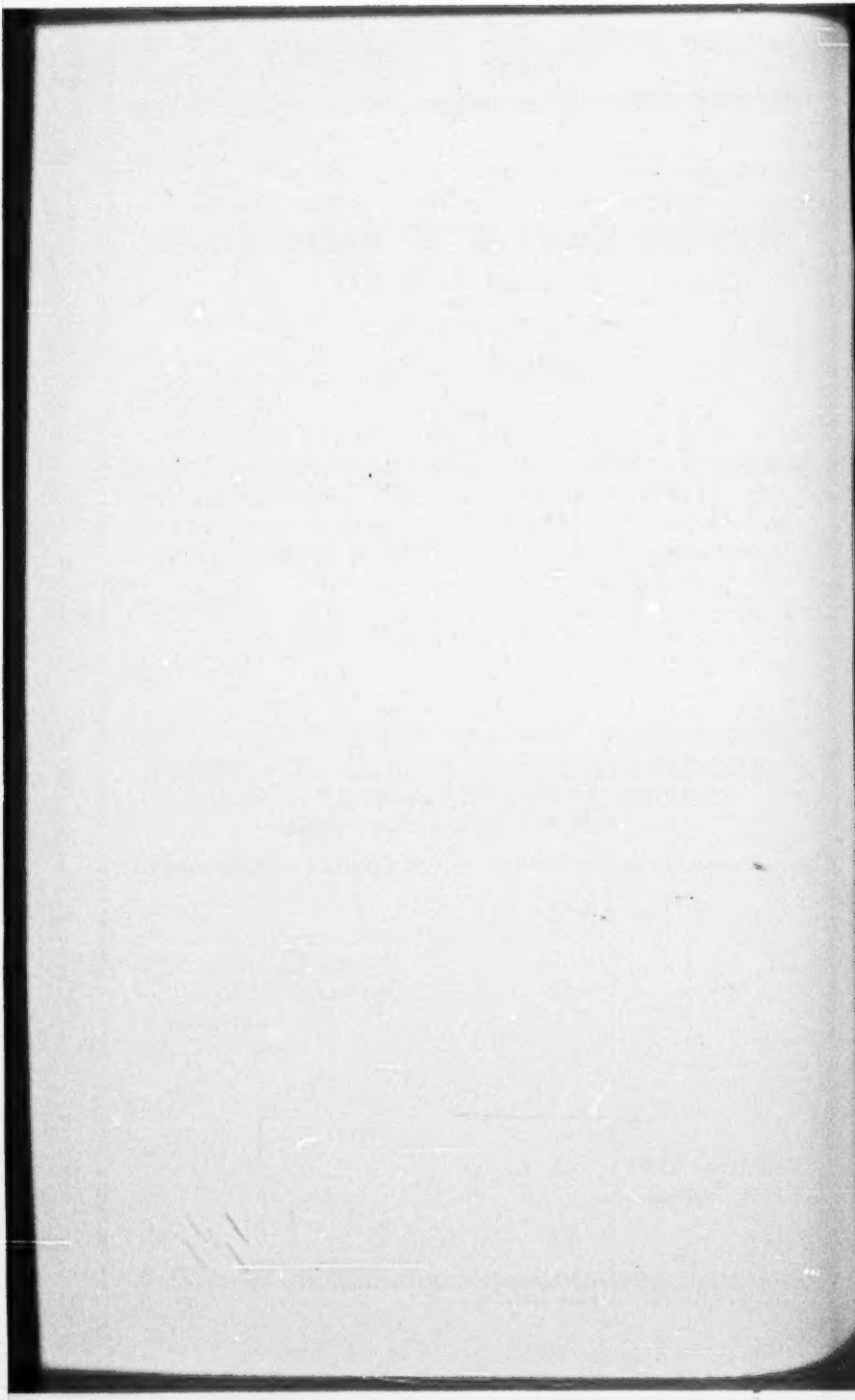
Respondent.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SIMONE N. GAZAN,
Attorney for Petitioner,
No. 1 Broadway.
New York City.

CHARLES A. ELLIS,
Of Counsel.

ACKERMAN PRESS, Phones BO 9-7107-8



INDEX

PAGE

The Petition 1

Statement of Case 2

Jurisdiction 4

The Questions Presented 5

Opinions Below 6

Reasons for Allowance of Writ 6

Certificate 8

The Brief 9

POINT ONE—The change of zoning from residential to industrial never became effective 10

POINT TWO—The action of the Board of Appeals was illegal because no mail notice was given 11

POINT THREE—The action of the Board of Appeals violated the Fourteenth Amendment 14

TABLE OF CASES CITED

Browning v. Hooper, 269 U. S. 396 12

Chesebro v. Los Angeles Flood District, 306 U. S. 459 12

City of New York v. N. Y., N. H. & H. R. R., 339 U. S. 306 ..... 4, 14

Escoe v. Zerbst, 295 U. S. 490 11

French v. Edwards, 80 U. S. 506 11

Gazan v. Corbett, et al., 100 N. Y. Supp. (2d) 429 6

PAGE

Gazan v. Corbett, et al., 278 App. Div. 953 6

Gazan v. Corbett, et al., 304 N. Y. 920 6

Mason v. Fearson, 50 U. S. 248 11

Mullane v. Central Hanover Bank, 344 U. S. 293 ...4, 6, 14

Ottinger v. Arenal Co., 257 N. Y. 371 14

Penn. Coal v. Mahon, 260 U. S. 393 13

Sackett Lake v. Levine, 268 App. Div. 809 12

Village of Williston Park v. Israel, 301 N. Y. 713 12

Washington ex rel. v. Roberge, 278 U. S. 116 12

STATUTES

Town Law of New York § 265 10

Town Law of New York § 267 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

SIMONE N. GAZAN,

Petitioner,

against

JOSEPH S. CORBETT, as Chairman, and HAROLD E. GRIFFIN, STEVEN G. JORDAN, FRANK P. RINK, as Members, and FRANK A. SCHAEFER, as Secretary, Constituting the Zoning Board of Appeals of the Town of Brookhaven, Suffolk County, New York,

Respondents,

OCEAN SHORE REALTY CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Simone N. Gazan, in behalf of himself and others similarly situated, respectfully prays a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York, entered the 16th day of April, 1953, which affirmed a decision of the Appellate Division of the Supreme Court of New York, Second Department, which final judgment deprived petitioner of a substantial property right by permitting the establishment of a public garbage dump in close proximity to petitioner's house, and other houses, without giving said property owners any notice and without giving them an opportunity to be heard.

Statement of the Case

Petitioner is the owner of a summer residence in Ocean Bay Park, Fire Island, Town of Brookhaven, Suffolk County, New York. This house is about 300 feet from lots 1 and 2, involved in this litigation.

There are two intervening owners between petitioner Gazan and said lots 1 and 2, and they have joined in the protest.

Lots 1 and 2, zoned as residential lots, are owned by Ocean Shore Realty Company, which owner desired to establish a public garbage dump on said lots. However, it was first necessary to obtain a change from residential to industrial classification by application to the Town Board.

Even after zone change it would then become necessary, under the law and ordinances, to apply to the Zoning Board of Appeals to have that body grant an exception to the general rule against garbage dumps in industrial zones.

The applicant for such exception, as required by the Town Law and the rules and ordinance of the Town of Brookhaven, must

a. Indicate on a map to be attached to the application any buildings nearby the site of the proposed garbage dump.

b. List by name all the surrounding property owners.

c. Notify by mail each of such owners of the application and of the time and place of hearing.

Although the attorney for the Ocean Shore Realty Company was present before the Town Board when Gazan, Hostedler and Smith, near and abutting owners, not only filed affidavits in opposition to the zone change but appeared personally before the Town Board in vigorous protest against the change, nevertheless he did not list any

property owner on his application to the Zoning Board of Appeals; did not indicate any buildings near to lots 1 and 2 and gave no mail nor personal notice to any property owner. His own name was the only one listed for a notice.

A photostat of the application for exception (Record, p. 28) shows these facts.

There was a single publication in the Patchogue Advance, a local paper of limited circulation in and around Patchogue. This did not comply with the requirements of general law, the town ordinance nor the application form.

The Town Board granted the change of zone from residential to industrial on April 19, 1950.

§ 265 of New York Town Law provides that such change shall not become effective until it shall have been published twice, once in each week for two consecutive weeks, and shall have been posted in six public places for not less than 10 days, or, in the alternative, making personal service of a certified copy thereof.

No publication was made. No notice was posted. No personal service was made upon any interested party.

Instead of 10 days or two weeks elapsing, after notice, before such change could legally become an effective change, the Ocean Shore Realty, ignoring the requirement of published, posted or personal notice, filed its application for an exception the *very next day*, to wit, April 20th and gave no notice by mail or personally for a hearing set for May 4th.

The Zoning Board of Appeals entered a default order granting the exception, because no one appeared in opposition.

That order was illegal not only because no notice was given the surrounding property owners but also because the zone change was not yet effective. That was a condi-

tion precedent before the Zoning Board of Appeals had any jurisdiction to grant an exception to the ordinance governing industrial sites so that a garbage dump could be created. At that time lots 1 and 2 were still residential lots.

Thereafter, upon learning of this action, petitioner and other owners who were affected, brought a certiorari proceeding in the Supreme Court of Suffolk County.

After trial Mr. Justice Colden granted judgment which annulled the action of the Zoning Board of Appeals as a violation of the Fourteenth Amendment of the Federal Constitution, relying upon the decision of this Court in *Mullane* v. *Central Hanover Bank,* 339 U. S. 306.

The Ocean Shore Realty appealed to the Appellate Division which reversed on the law.

Gazan appealed to the Court of Appeals which affirmed, without opinion, but by amended remittitur certified that a Federal question under the Fourteenth Amendment of the Constitution was involved and necessarily considered, but that their constitutional rights under said Amendment had not been violated or denied.

Jurisdiction

The jurisdiction of this Court to entertain this petition, and to grant the same, is provided by Section 1257 of Title 28 of the United States Code and by the Rules of this court.

Petitioner's constitutional rights have been denied him and the appellate courts below have ignored the decisions of this court in *Mullane* v. *Hanover Bank,* 339 U. S. 306 and *City of New York* v. *New York, N. H. & H. R. R.,* 344 U. S. 293; 73 S. Ct. 299, and have decided a Federal question in a way probably not in accord with the applicable decisions of this Court.

The Questions Presented

The controlling question which this petition presents is whether the action of the Ocean Shore Realty Company and the Zoning Board of Appeals in so over-riding the rights of the surrounding property owners in the high-handed and illegal steps taken to create a garbage dump adjacent and near private homes, violated the constitutional rights of such owners.

This basic question arises from the following illegal acts:

a. The failure of the Zoning Board of Appeals to give the surrounding property owners notice by mail, as required by law, as distinguished from notice by newspaper publication.

b. By ignoring the requirements of New York Town Law for newspaper notice and posted notices in six public places for 10 days or, by personal service of a certified copy of the zone change, which left the zone change suspended until said law was complied with, and therefore the Zoning Board of Appeals had no jurisdiction, and its action in granting the exception so as to permit the garbage dump, denied said owners the equal protection of the law and deprived them of property without due process as guaranteed by the Federal Constitution.

c. Petitioner and other owners were necessary parties to any proceeding which would affect their property value or its enjoyment. As such parties they were entitled to notice by mail under Town Law, § 267, par. 5 and their rights cannot be ignored or impaired simply because the applicant, or the Zoning Board of Appeals, saw fit not to have them listed as surrounding owners. To so divest petitioner and other owners of their status, or their right to be considered, as parties had the effect of modifying

or impairing property rights, without notice and an opportunity to be heard, which violated their rights under the Fourteenth Amendment of the Federal Constitution.

Opinions Below

The opinion of Mr. Justice Colden expressly was based upon the failure to give mail notice, as required, or any other adequate or sufficient notice, and that such failure was a denial of due process, and relied upon the *Mullane* decision of this Court.

His opinion is reported in 100 N. Y. Supp. (2d) 429 (not officially reported).

The Appellate Division decision reversed Judge Colden on the law, holding that petitioner was not deprived of property without due process of law. "The subject matter of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, is readily distinguishable, and that decision is not controlling." This decision is reported in 278 App. Div. 953; 105 N. Y. Supp. (2d) 187.

The Court of Appeals affirmed without opinion but certified that a Federal constitutional question was present and considered.

Gazan v. *Corbett, et al.*, 304 N. Y. 920.

Reasons Relied on for Allowance of the Writ

1. The decision complained of ignored, or failed to consider, the requirements of law as conditions precedent to a valid change from residential to industrial zone, such as publication, posting notices or by personal service.

2. The decision complained of ignored, or failed to consider, the entire absence of mail or personal notice to vitally interested property owners, and the taking of a virtual default judgment against them because no one appeared in opposition when no opportunity to appear or oppose was given.

3. The statute, Town Law, § 265, par. 5, imposes on the Zoning Board of Appeals the duty of sending mail notices to the parties. This duty the Board not only did not perform but, although delegating that duty to applicants by requiring on its application form the notation of nearby buildings and the names of surrounding owners, it did not see to it that an applicant complies with the application requirements.

4. The law, Town Law, § 265, par. 5, directs the Board of Appeals to give notice of hearing and "shall, at least five days before such hearing, mail notices thereof to the parties."

No such notice was given by the Board of Appeals and its action was an *ex parte* violation of the rights of surrounding owners, who were the parties entitled to notice, and was contrary to the Fourteenth Amendment of the Federal Constitution.

5. Since the failure to publish and post notices, or serve a notice personally, in respect of the change of zone from residential to industrial, no change had been made. It was an executory order to become final only after compliance with the statute, which requires publication once a week for two weeks and posting of notices in six places for 10 days.

Ocean Shore Realty did not wait for either event but filed its application with the Board of Appeals *the very next day,* April 20, 1950. Such application was not only premature but there was no valid change of zone upon which it could operate.

6. The attempted change of zone was abortive. Therefore, the application to the Zoning Board of Appeals was ineffective because (a) there was no legal zone change upon which to predicate an exception and (b) no mail notice of hearing had been given. The property owners

had no day in court in respect of the action of the Zoning Board of Appeals.

The Appellate Division and the Court of Appeals entirely disregarded the flagrant indifference to law as shown by the action of the Ocean Shore Realty Company and the Zoning Board of Appeals, and also disregarded the controlling decisions of this Court as to adequate notice.

The whole proceeding is indicative of unlawful speed, secrecy and avoidance of notification rather than the giving of reasonable notice, in all fairness, as required by the Fourteenth Amendment.

Respectfully submitted,

SIMONE N. GAZAN,
in propria persona, and
Attorney for Petitioner.

CHARLES A. ELLIS,
Of Counsel.

Certificate.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

SIMONE N. GAZAN.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

SIMONE N. GAZAN,

Petitioner,

against

JOSEPH S. CORBETT, as Chairman, and HAROLD E. GRIFFIN, STEVEN G. JORDAN, FRANK P. RINK, as Members, and FRANK A. SCHAEFER, as Secretary, Constituting the Zoning Board of Appeals of the Town of Brookhaven, Suffolk County, New York,

Respondents,

OCEAN SHORE REALTY CO.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Before the owner of residential lots 1 and 2 could create a garbage dump thereon, it was necessary to do two things.

First, obtain a zoning change from residential to industrial from the Town Board.

Second, after legally obtaining this change, to then apply to the Zoning Board of Appeals to grant an exception, under the ordinances, so that a garbage dump could be created.

Application for zoning change was made to the Town Board and several property owners filed written protests and also personally appeared to voice their objections.

POINT I

The change of zoning from residential to industrial never became effective.

The Town Board granted the change but this was conditioned by law upon the giving of certain notices before the change became effective. That law provided:

> "Changes, amendments or supplements made to any zoning ordinance adopted pursuant to the provisions of this chapter shall not become effective until it shall have been published in a newspaper . . . twice, once in each week for two consecutive weeks, and shall have been posted in six public places in such town for not less than ten days. In any specific case, however, such zoning ordinance shall take effect when personal service is made of a copy thereof certified by the town clerk under the corporate seal of the town and showing the date of its passage by the town board."
>
> New York Town Law, § 265.

This law was not complied with so lots 1 and 2 remained residential, and on which no garbage dump could be legally created.

The next step, assuming a zone change had become effective, was to apply to the Zoning Board of Appeals for an exception as provided in the Town Ordinance. This ordinance prohibits the use of property for a garbage dump but vests the Board of Appeals with the power to make an exception upon proper showing.

The language of the ordinance as to an exception is as follows:

> "except as a special exception by the Board of Appeals as hereinafter provided."
>
> Town of Brookhaven Ordinance, § 1300.

Of course the Board of Appeals had no right to act because lots 1 and 2 were still residential.

POINT II

The action of the Board of Appeals was illegal because no mail notice was given.

The applicable statute pointed the duty of the Board of Appeals:

> "The board of appeals shall fix a reasonable time for the hearing of the appeal or other *matter referred to it* and give public notice thereof by the publication in the official paper of a notice of such hearing, at least five days prior to the date thereof, and shall, at least five days before such hearing, *mail notices thereof to the parties.* . . . Upon the hearing, any party may appear in person or by agent or by attorney." (Italics supplied.)
>
> New York Town Law, § 267, paragraph 5.

These statutory provisions are of the character which this Court has uniformly held to be mandatory, and hence conditions precedent to the valid exercise of jurisdiction by corporate boards or officials. In *French* v. *Edwards*, 13 Wall. 506; 80 U. S. 506, 511, this Court stated the governing principle as follows:

> "But when the requirements prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory."

To the same effect,

> *Escoe* v. *Zerbst*, 295 U. S. 490, 494;
> *Mason* v. *Fearson*, 9 How. 248; 50 U. S. 248.

The decision herein conflicts in this respect with these decisions.

The New York decisions themselves establish, under these or comparable statutory provisions, that where publication and posting has not occurred as required by statute, the mere executory change of zoning is not "effective".

Village of Williston Park v. *Israel,* 301 N. Y. 713;
Sackett Lake Property Owners Assn. v. *Levine,* 268 App. Div. 809, leave to appeal denied, 294 N. Y. 645;
Rathkopf, Law of Zoning and Planning, p. 41.

Since the April 19, 1950 executory change of zoning had not become effective, the present case is within the distinction noted in *Chesebro* v. *Los Angeles County Flood Control District,* 306 U. S. 459, 464, where the districting is not created by the legislature, the "owners are entitled, under the due process clause of the Fourteenth Amendment, to be heard by some official or tribunal empowered by the state to hear them and to consider and decide."

In *Browning* v. *Hooper,* 269 U. S. 396, 405, this Court held that road districting and assessment violated due process where the districts were not legislatively created and appellant was not given an opportunity to be heard, saying:

> "But it is essential to due process of law that such owners be given an opportunity to be heard on that question where, as herein, the district was not created by the legislature, and there has been no legislative determination that other property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. . . . The act is repugnant to the due process clause of the Fourteenth Amendment."

See also *Washington, ex rel. Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 122, holding a zoning law provision repugnant to the due process clause of the Fourteenth Amendment.

The enforced depreciation in value of petitioner's property through establishment of a nearby garbage dump is as much an imposition as would be an improvement tax or an outright taking of property.

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 to 416, this Court said:

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way."

The Board of Appeals evidently delegated the duty of giving notice by mail to the applicant for relief because its printed application form requiring the applicant to list the "surrounding" (not adjacent, as was incorrectly urged below) owners and also indicate on the map any nearby buildings. (Photostat of Application, Record, p. 28.)

But the only person listed by the applicant, Ocean Shore Realty Co., to be notified of the April 20, 1950 application to the Zoning Board of Appeals, or the May 4, 1950 hearing thereof, and the only person to whom notice thereof was mailed, was the attorney for the corporation making the application who had signed the application on its behalf. No notice of the April 20, 1950 application or hearing thereon, or of the April 19, 1950 executory change of zoning, was mailed to, or served on petitioner, or other property owner.

The only notice sent by the Board of Appeals was mailed to the attorney who had filed the application.

Once, on April 27, 1950 a notice was published in The Patchogue Advance, a remote, local newspaper of that town, advising the hearing on May 4th.

That notice was not read by petitioner, who lived in Manhattan, nor by his next door neighbor, Hostedler, who lived in Brooklyn nor by Miss Smith, abutting owner of lots 1 and 2, and who lived in Islip.

The attorney for the Ocean Shore Realty Company knew that these owners had strenuously opposed the zone change because they knew that such change may lead to a permit for the garbage dump, yet knowing of this opposition, he neither listed their names nor indicated their dwellings on his application form.

POINT III

The action of the Board of Appeals constituted a violation of petitioner's rights as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Under decisions of this Court the utter failure to give these owners any notice, mail, personal or otherwise to give them an opportunity to protect their property rights was a denial of due process and a violation and denial of their protection under the Fourteenth Amendment of the Federal Constitution.

Mullane v. *Central Hanover Bank,* 339 U. S. 306; 70 S. Ct. 652;
City of New York v. *N. Y., N H. & H. R. R.,* 344 U. S. 293; 73 S. Ct. 299.

The case of *Ottinger* v. *Arenal Realty Co.,* 257 N. Y. 371, relied on by the Appellate Division, has no application to this case. That decision involved a variance of zoning resolution to permit establishment of a garage. The applicant sent mail notices. By error one nearby owner did not receive the notice. The Court simply held that there was no obligation on applicant to do more than mail to

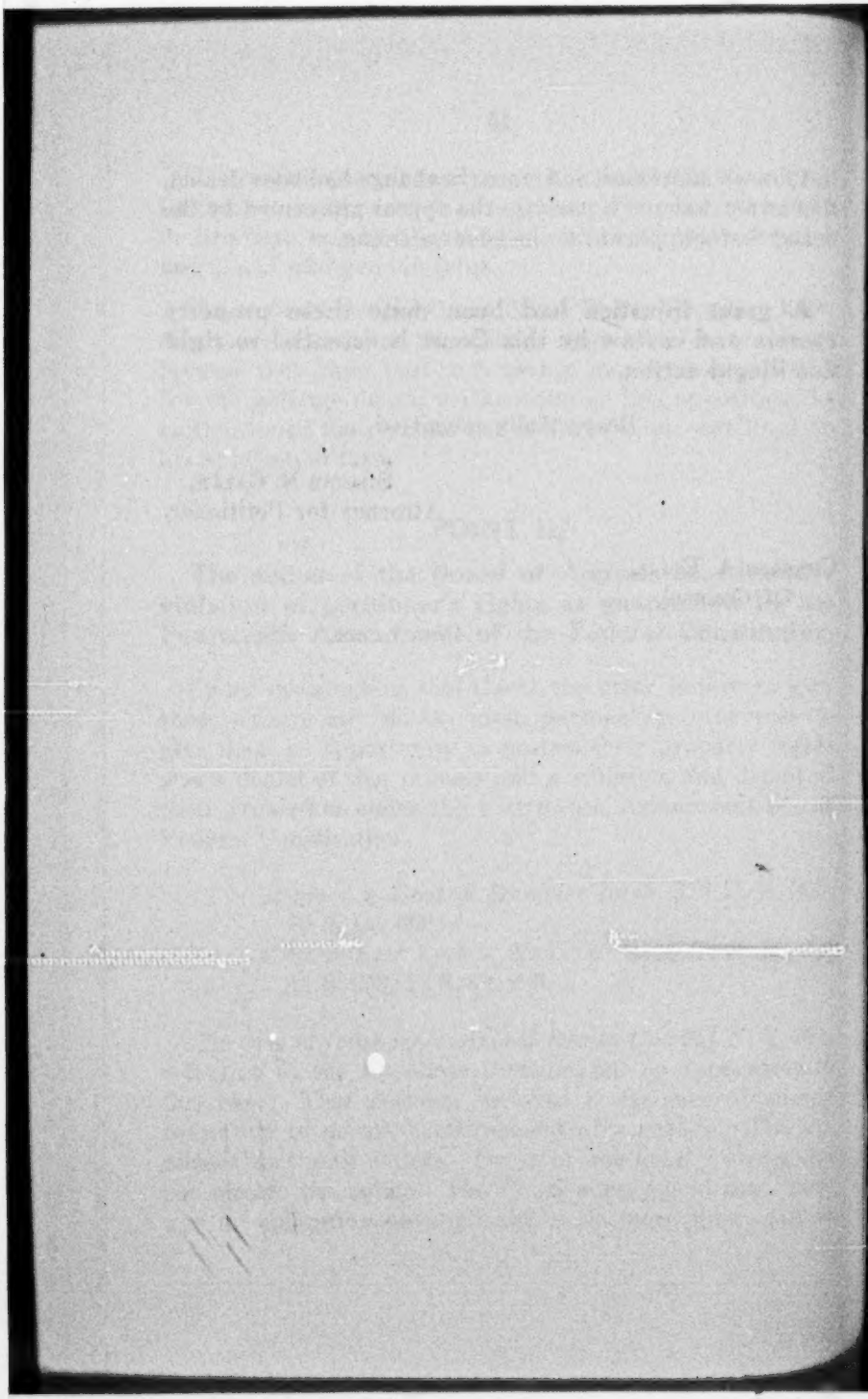
last known addresses, and since the change had been denied, this owner was not a party to the appeal prosecuted by the unsuccessful applicant to the adverse ruling.

A great injustice had been done these property owners and review by this Court is essential to right this illegal action.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

CHARLES A. ELLIS,
Of Counsel.



18

No. 161

Office - Supreme Court, U. S.
FILED
JUL 29 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

SIMONE N. GAZAN,

Petitioner,

against

JOSEPH S. CORBETT, as Chairman, and HAROLD E. GRIFFIN, STEVEN G. JORDAN, FRANK P. RINK, as Members, and FRANK A. SCHAEFER, as Secretary, Constituting the Zoning Board of Appeals of the Town of Brookhaven, Suffolk County, New York,

Respondents,

OCEAN SHORE REALTY CO.,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ROBERT H. PELLETREAU,
Attorney for Respondents,
83 East Main Street,
Patchogue, Suffolk County,
New York.

DOUGLAS E. BROWN,
Of Counsel.

APPEAL PRINTING CO. INC., 150 CEDAR ST., NEW YORK, WORTH 4-3033

INDEX

PAGE

STATEMENT OF CASE 1

THE QUESTION PRESENTED 4

ARGUMENT:

POINT I—The change of zone granted by the Town Board became effective as to the Zoning Board of Appeals 6

POINT II—The Zoning Board of Appeals gave proper notice of the application to it 6

POINT III—The petitioner was not deprived of property nor were his rights violated under the Fourteenth Amendment to the Constitution 8

CONCLUSION 9

Case Cited

Ottinger v. *Arenal Realty Co., Inc.*, 257 N. Y. 371 ..... 7, 8

Statutes Cited

New York State Town Law:
Section 264 3
Section 265 ..... 3, 6
Section 267 ..... 4, 6

New York City Charter, Section 719, Subdivision 5 7

Town of Brookhaven Building Zone Ordinance:
Section 1300 2
Section 1601 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

SIMONE N. GAZAN,

Petitioner,

against

JOSEPH S. CORBETT, as Chairman, and HAROLD E. GRIFFIN, STEVEN G. JORDAN, FRANK P. RINK, as Members, and FRANK A. SCHAEFER, as Secretary, Constituting the Zoning Board of Appeals of the Town of Brookhaven, Suffolk County, New York,

Respondents,

OCEAN SHORE REALTY CO.,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement of the Case

Petitioner purports to act on behalf of himself and others similarly situated. He is the sole petitioner here and below and the proceeding is not in representative form.

The Zoning Board of Appeals of the Town of Brookhaven did not deprive the petitioner of a substantial property right and did not permit the establishment of a "public garbage dump". It granted such permission "for the use of the Ocean Bay Park Property Owners Association" (Record page 34, folio 102).

Ocean Bay Park is a development on the Great South Beach (referred to by the petitioner as Fire Island) which is between the Atlantic Ocean and the Great South Bay on the south shore of Long Island. The Beach is separated from the mainland by about four miles across the Great South Bay.

The confined area and its remoteness from the mainland created a refuse disposal problem. Obviously refuse had to be disposed of in the area and not in some other community.

The developer, the respondent, Ocean Shore Realty Co., Inc., presented two applications to the Brookhaven Town Board for a change of zone from "Residence F" to "Industrial L". At the hearings on the changes applied for, the petitioner appeared before the Town Board in favor of one location and the respondent, Ocean Shore Realty Co., Inc., favored the other location. The Town Board, based upon the recommendation of the Planning Board and other agencies, denied the application for the location favored by the petitioner and granted the application for the location favored by the respondent, Ocean Shore Realty Co., Inc.

The Building Zone Ordinance of the Town of Brookhaven under which the zoning of the premises was changed to "L Industrial" prohibits a refuse dump in such a district, except as a special exception by the Board of Appeals (Section 1300). The petitioner in acting under that Ordinance and in appearing before the Town Board

was chargeable with knowledge of the necessary procedure to procure a permit to use the premises for refuse disposal.

The Brookhaven Town Building Zone Ordinance, Section 1601, also provides as follows:

> SECTION 1601—Upon filing with the Town Board a petition duly signed and acknowledged, by an owner or owners of property in any district or part thereof, requesting an amendment, supplement, change, modification or repeal of the regulations prescribed for or of the Zoning Map, including such district or part thereof, the Town Board, by resolution adopted at a stated meeting, shall fix the time and place for public hearings thereon and shall give notice thereof in accordance with Section 264 of the Town Law, and PROVIDED further, that before the advertising of a public hearing, the Town Board may, in a written request, instruct the Town Planning Board to prepare an official report defining the conditions described in the petition and determining the area so affected.

The petitioner is, therefore, incorrect in stating that the applications for change of zone were made under Section 265 of the Town Law of the State of New York requiring publication twice in two newspapers and posting in six public places for ten days prior to the Ordinance becoming effective. Section 264 of the Town Law, under which the change was granted, provides for publication once in one newspaper and posting once for ten days. However, that is immaterial here because the proceeding was not brought to review the action of the Town Board and the question was not presented to the Courts below.

No law, rule or ordinance requires any of the items enumerated as a, b, and c on page 2 of the petition. The only requirement for any of those items is the form of

application to the Zoning Board of Appeals (Record, page 28). That is merely a form which requests certain information for the Board of Appeals.

The petitioner states that there was a single publication in The Patchogue Advance of the notice of the application to the Board of Appeals and that did not comply with the requirements of the general law, the Town Ordinance nor the application form. There is no authority for that statement. Section 267 of the Town Law of the State of New York provides for publication of the notice at least five days prior to the date of the hearing on the application. The record shows that that procedure was followed and that requirement as to the application to the Board of Appeals should not be confused with the application to the Town Board for the change of zone nor the publication and posting necessary to make the change effective.

The Question Presented

The petitioner enumerates three questions which he deems should be considered by this Court (Petition, page 5). Those questions, with one exception, were not raised by the petitioner in the pleadings and were not presented to the Courts below. The petitioner in his affidavit submitted to the New York State Court of Appeals on his motion for leave to omit certain items from the record stated:

> "The sole question therefore before this Court upon the Appellant's appeal is one of law, namely, whether the Petitioner (the Appellant on this appeal) and other residents within a reasonable radius of the proposed garbage dump and incinerator were entitled to actual notice of hearing by mail in addition to the published notice."

The above is the only question presented here and the Court's jurisdiction rests upon whether or not the petitioner's property rights were impaired by reason of not having notice of the application to the Brookhaven Town Zoning Board of Appeals. The petitioner contends that the form of application to the Board of Appeals (Record, page 28) requires that the names of adjoining property owners be given. Conceding that to be true, even though no statute or ordinance requires the same, the petitioner would not have been entitled to notice because his property is separated from the *locus in quo* by the properties of two intervening owners comprising a distance of 300 feet. Thus, if adjoining owners could be considered parties to the application to the Zoning Board of Appeals, the petitioner would not have been one of those parties.

Judgment of affirmance in favor of the respondents was rendered by the New York State Court of Appeals on January 16th, 1953 and that judgment with the remittitur was entered in the Suffolk County Clerk's Office as Clerk of the New York State Supreme Court on January 24th, 1953. That judgment became final at that time and more than ninety days have elapsed since that time. Thereafter, petitioner moved for reargument and to amend the remittitur and for certification that a question was presented to and passed upon by the New York State Court of Appeals existing under the Constitution of the United States. On April 16th, 1953, the Court of Appeals rendered a decision denying the motion for reargument and granting the motion to amend the remittitur and for certification of the question, but to date no order has been entered upon that decision and the remittitur has not been amended or, if so, the respondents have not received notice of that procedure. The petitioner, therefore, moves to dismiss the petition on the ground that more than ninety

days have elapsed since the original final decision of the New York State Court of Appeals.

POINT I

The change of zone granted by the Town Board became effective as to the Zoning Board of Appeals.

It has been pointed out above that petitioner is under the erroneous assumption that the Town Board acted under Section 265 of the Town Law of the State of New York. The Zoning Ordinance specifies that Section 264 of that Law is the applicable Section and the Town Board was acting thereunder. That Section provides that an amendment to the ordinance shall take effect from the date of its service as against a person served personally with a certified copy thereof. The certified copy of the change granted in this instance, which was presented to the Zoning Board of Appeals, does not appear in the record, because the question of the effectiveness of the change was not presented to the Court of original jurisdiction. However, that is the fact and the certified copy was presented to the Board of Appeals with the application to use the premises for refuse disposal and the change was effective as to that Board. It, therefore, had the right to grant the exception requested.

POINT II

The Zoning Board of Appeals gave proper notice of the application to it.

Section 267 of the New York State Town Law provides that notice of hearing upon an application to a Zoning Board of Appeals shall be given by publication five days

prior to the date thereof and at least five days before such hearing by mailing notices to the parties. The only parties to the application were the Building Inspector, who refused the application for the building permit, and the applicant.

A similar reference "to the parties" appeared in Section 719, Subdivision 5 of the New York City Charter. Chief Judge Cardozo of the New York State Court of Appeals construed that expression in *Ottinger* v. *Arenal Realty Company, Inc.*, 257 N. Y. 371 at page 376, where it was held:

> "Upon an application to the Board for a departure from the uses prescribed by the zoning resolution, the neighboring lot owners are not 'parties' within the meaning of this statute. The application takes the form of an appeal by the owner from the order of the Superintendent of Buildings refusing a permit for the non-conforming use. The parties to the appeal are the petitioning owner on the one hand and the Superintendent of Buildings on the other".

The situation was identical here and the Board of Appeals, therefore, complied with the requirement of the statute. The cases cited by the petitioner are those which refer to instances where a person was denied all opportunity to be heard and where no officer or tribunal was empowered by law to hear, consider and determine what action should be taken. Here a notice of hearing was published and the hearing held. The petitioner acting under the Zoning Ordinance and chargeable with knowledge thereof should not be heard to complain that he did not receive personal notice of the hearing before the Board of Appeals, when he knew the same must be held as part of the procedure necessary to use the premises

for refuse disposal. His real complaint here is that the Town Board granted a change of zone to which he was opposed and denied the change which he favored.

POINT III

The petitioner was not deprived of property nor were his rights violated under the Fourteenth Amendment of the Constitution.

It is the settled law that a Zoning Ordinance does not create a vested property right. At most, it is a mere Police regulation concerning the use to which property may be put. Such a regulation or ordinance not affecting vested property rights may be changed, amended or repealed at any time. In the case of *Ottinger* v. *Arenal Realty Company, Inc.*, 257 N. Y. 371 at page 379, Chief Judge Cardozo for the New York State Court of Appeals said:

> "A permit granted by the Board for a non-conforming use does not take from the public or from any member of the public an interest or easement in the land exempted from the general rule. The zoning resolution might be repealed overnight without violating the Constitution. Whatever right to a preliminary notice belongs to the public or to any of the members of the public has its origin in the resolution and is measured by its terms."

The petitioner has failed to note that all the cases cited by him decided by this Court concern a vested property right or are cases where no hearing was given to the property owner. For that reason the decision herein by the New York State Court of Appeals does not conflict with the decisions in the cases cited.

CONCLUSION

The petition should be dismissed on the ground that it was presented to this Court more than ninety days after the final decision of the New York State Court of Appeals or denied because the petitioner's rights under the Fourteenth Amendment of the Constitution have not been violated.

Respectfully submitted,

ROBERT H. PELLETREAU,
Attorney for Petitioner.

DOUGLAS E. BROWN,
Of Counsel.